

**BEFORE THE INVESTIGATIVE PANEL OF THE  
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION  
STATE OF FLORIDA**

INQUIRY CONCERNING NO. 03-119  
RE: JUDGE DAVID M. GOODING  
SUPREME COURT CASE NUMBER SC04-133

**MOTION TO DISMISS FORMAL CHARGES 3 AND 4 AND  
MEMORANDUM OF LAW IN SUPPORT THEREOF**

Respondent, David M. Gooding (referred to herein as “Judge Gooding”), pursuant to Rule 1.140, Florida Rules of Civil Procedure, moves to dismiss the formal charges alleged in paragraphs 3 and 4 of the Notice of Formal Charges on the following grounds, as more fully set forth in the accompanying Memorandum of Law:

1. Pursuant to Rule 1.140, Florida Rules of Civil Procedure, the allegations in paragraphs 3 and 4 should be dismissed because each allegation fails to state a cause of action upon which relief can be granted.

2. Paragraph 3 alleges in part that Judge Gooding “knowingly misrepresented [his] opponent’s experience and qualifications by, inter alia, representing that [his] opponent overestimated his courtroom experience....” (emphasis in original.) By using the term *inter alia*, the Commission implied that Judge Gooding misrepresented his opponent’s experience and qualifications by methods other than the statement dealing with courtroom experience, yet the

Commission fails to disclose what those other methods are. Accordingly, by inclusion of the term *inter alia*, the Commission failed to state a cause of action, and failed to provide Judge Gooding with sufficient notice of the basis for the charges against him to be able to respond and defend against those charges adequately, in violation of Rule 1.110(b), Florida Rules of Civil Procedure.

3. Similarly, in paragraph 4 of the Notice of Formal Charges, the Commission alleges that Judge Gooding “knowingly misrepresented [his] opponent’s ownership and the condition of certain rental properties in Clearwater and Lakeland, Florida, by, *among other statements* distributing an inherently misleading flyer....” (emphasis added.) By using the phrase “among other statements,” the Commission implied that Judge Gooding made statements which knowingly misrepresented his opponent’s ownership in the properties, or the condition of the properties, other than those included in the flyer. Again, the Commission failed to state with any specificity what those statements were, to whom they were made, in what context they were made, or whether they were supported by any evidence. Thus, the Commission again failed to state a cause of action, and again violated Judge Gooding’s right to be adequately noticed of the specific charges against him so that he may respond appropriately, in violation in Rule 1.110(b), Florida Rules of Civil Procedure.

4. The Commission’s allegations in paragraph 4 of the Notice of Formal

Charges are based on the distribution of “an inherently misleading flyer.” However, the Commission has failed to attach a copy of this flyer, in violation of Rule 1.130(a), Florida Rules of Civil Procedure.

5. Paragraph 4 alleges that Judge Gooding “falsely described the rental properties as ‘slum-like’ and ‘blighted’” in a campaign flyer. However, as the flyer clearly indicated, the terms used to describe the properties were direct quotes from newspapers articles concerning the properties in question. The properties were described as “slumlike” and “blighted” in a St. Petersburg Times article entitled “*From Raggedy to Renovated, A Complex’s Makeover Wows Residents*,” ST. PETERSBURG TIMES, Aug. 1, 2002. A copy of this article is attached hereto as Exhibit “A.” Accordingly, Judge Gooding did not *falsely* describe the properties; rather, he simply described them, using the same terms as the Pulitzer-Prize winning St. Petersburg Times. Therefore, the allegations in paragraph 4 should be dismissed.

6. The allegations of paragraphs 3 and 4 should be dismissed because Judge Gooding acted in reliance and good faith on the advice of the Judicial Ethics Advisory Committee regarding publication of the mail piece in question. Prior to publication of the mail piece, Judge Gooding inquired of the Judicial Ethics Advisory Committee, which answered in the affirmative the following question: “May a judicial candidate publicize information about his or her opponent’s business practices and dealings as

gleaned from public records and newspaper articles?” J.E.A.C. Opinion No. 2002-13. Thus, Judge Gooding’s request for advice on this subject from the Judicial Ethics Advisory Committee demonstrates his due consideration of the Judicial Canons regulating acceptable behavior of judicial candidates.

7. The allegations of paragraphs 3 and 4 should be dismissed because the conduct described therein is Constitutionally-protected political free speech.

### **MEMORANDUM OF LAW**

A. The Allegations in Paragraphs 3 and 4 Should Be Dismissed Because They Fail to Sufficiently Advise Judge Gooding of the Charges Against Him.

Rule 12, Florida Judicial Qualifications Commission Rules, provides “[i]n all proceedings before the Hearing Panel, the Florida Rules of Civil Procedure shall be applicable except where inappropriate or otherwise provided by these rules.” Rule 1.110(b), Florida Rules of Civil Procedure requires a claim for relief to contain “a short and plain statement of the ultimate facts showing that the pleader is entitled to relief.” Specifically, the pleader “must set forth the facts in such a manner as to reasonably inform his adversary of what is proposed to be proved in order to provide the latter with a fair opportunity to meet it and prepare his evidence.” Walker v. Walker, 254 So.2d 832, 833 (Fla. 1<sup>st</sup> DCA 1971); see also Seaboard Air Line Ry. V. Rentz, 54 So. 13 (Fla. 1911)(pleadings should be certain, clear, concise); Horowitz v.

Laske, 855 So. 2d 169, 173 (Fla. 5<sup>th</sup> DCA 2003)(“litigants must state their pleadings with sufficient particularity for a defense to be prepared”).

The Commission’s allegations in paragraphs 3 and 4 of the Notice of Formal Charges accuse Judge Gooding of knowingly misrepresenting his opponent’s qualifications for office and ownership interest in certain rental properties. However, the Commission alleges that Judge Gooding made these misrepresentations, “*inter alia*,” by, “*among other things*,” distributing a campaign flyer. See Notice of Formal Charges, ¶¶ 3, 4. The Commission’s use of the terms “*inter alia*” and “*among other things*” implies that Judge Gooding made additional misrepresentations, or employed additional methods to disseminate information, other than those detailed in the Notice of Formal Charges.

In doing so, the Commission failed to meet the minimum pleading requirements established by the Florida Rules of Civil Procedure. Due to the Commission’s failure to state the charges against Judge Gooding with sufficient particularity for a defense to be prepared, Judge Gooding cannot adequately respond to or defend the charges against him as they are currently stated.

B. The Allegations in Paragraph 4 Should Be Dismissed Because the Commission Failed to Attach the Flyer Which is the Subject of the Allegations.

Rule 1.130(a), Florida Rules of Civil Procedure, provides in relevant part,

“[a]ll...documents upon which action may be brought...shall be incorporated in or attached to the pleading.” The Notice of Formal Charges refers to a campaign flyer distributed by Judge Gooding, which allegedly misrepresents his opponent’s ownership interest in certain rental properties and the condition of the properties. See Notice of Formal Charges, ¶ 4. However, the Commission failed to attach this flyer to its Notice of Formal Charges, or to incorporate the exact language of the flyer on which the charges are based.

The importance of this omission is amplified when coupled with the fact that the Commission’s materials on this matter may be incomplete. Accordingly, the Commission’s failure to attach the disputed campaign materials has prevented Judge Gooding from adequately responding to the charges, as he is unable to assess whether the Commission’s charges are based upon the complete campaign flyer or just a portion of it.

- C. The Charges in Paragraphs 3 and 4 Should Be Dismissed Because Judge Gooding Requested Advice From the Judicial Ethics Advisory Committee Regarding Publication of the Mail Piece in Question and Relied on that Advice in a Good Faith Effort to Comply With the Judicial Canons.

In Petition of the COMMITTEE ON STANDARDS OF CONDUCT FOR JUDGES, 327 So.2d 5 (Fla. 1976), the Florida Supreme Court created a Committee on Standards of Conduct Governing Judges. The Court stated that the purpose of the

Committee “shall be to render written advisory opinions to inquiring judges concerning the propriety of contemplated judicial and non-judicial conduct.” Id. Although the Committee’s advisory opinions are not binding on the Judicial Qualifications Commission, the Supreme Court held that “[a]n opinion of the Committee may, however, in the discretion of the Commission, be considered as evidence of a good faith effort to comply with the Code of Judicial Conduct.” Id.

Prior to distributing the campaign materials at issue in this case, Judge Gooding considered the Judicial Canons applicable to candidates for judicial office, specifically Canon 7. Additionally, Judge Gooding sought the advice of a competent, experienced libel attorney regarding the contents of the campaign mail pieces. In a further effort to comply with the rules regulating judicial candidates, Judge Gooding sought the advice of the Judicial Ethics Advisory Committee (“JEAC”). As reflected in Opinion 2002-13, the JEAC advised Judge Gooding that a judicial candidate may publicize information about his or her opponent’s business practices and dealings as gleaned from public records and newspaper articles.

Judge Gooding published the campaign materials at issue here only upon receiving the advice of the JEAC. Judge Gooding acted in good faith reliance on the JEAC’s opinion when distributing these materials. Judge Gooding’s demonstrated record of seeking out a judicial interpretation of the applicable rules, as well as his

demonstrated record of attempting to comply, in good faith, with all applicable rules, evinces his fitness to hold judicial office.

D. The Charges in Paragraphs 3 and 4 Should Be Dismissed Because the Conduct Described Therein Is Constitutionally-Protected Political Free Speech.

“A candidate’s speech during an election campaign ‘occupies the core of the protection afforded by the First Amendment.’ The proper test to be applied to determine the constitutionality of restrictions on ‘core political speech’ is strict scrutiny.” Weaver v. Bonner, 309 F.3d 1312 (11<sup>th</sup> Cir. 2002)(citing and quoting McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995)). “Under strict scrutiny analysis, the government has the burden of proving that the restriction is “(1) narrowly tailored, to serve (2) a compelling state interest.” Id. (quoting Republican Party of Minnesota v. White, 536 U.S. 765 (2002)).

In Weaver, the Eleventh Circuit Court of Appeals ruled that although preserving the integrity of the judiciary is a compelling state interest, Canon 7(B) of the Georgia Code of Judicial Conduct<sup>1</sup> was not narrowly tailored to serve that interest because, in

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<sup>1</sup> Georgia’s Canon 7(B) provided that candidates for any judicial office filled by public election between competing candidates “shall not use or participate in the use of any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve.”



the court’s opinion, it prohibited “both false statements negligently made and true statements that are misleading and deceptive.” Id. at 1319. The Weaver court specifically held that Canon 7(B)’s restriction on “negligently made false statements” violated the First Amendment to the Constitution of the United States. Id. at 1319-1320.

The Weaver court articulated its reasoning as follows:

“[E]rroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need ... to survive. The chilling effect of ... absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns.” Therefore, to be narrowly tailored, restrictions on candidate speech during political campaigns must be limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the statement is false – i.e., an actual malice standard. Restrictions on negligently made false statements are not narrowly tailored under this standard and consequently violate the First Amendment.

Id. (citing and quoting Brown v. Hartlage 456 U.S. 45 (1982)).

Canon 7(d)(iii) of the Florida Code of Judicial Conduct provides that a candidate for judicial office “shall not (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.”

Thus, Florida’s Canon 7(d)(iii) differs from Georgia’s Canon 7(B) in that Florida’s Canon 7(d)(iii) restricts only intentional misrepresentations. Upon initial

review, this restriction would seem to survive the Weaver court's standard for restricting candidate speech during political campaigns. However, as Canon 7 is applied to Judge Gooding, it also prohibits statements by a candidate made with a good faith belief in the veracity of those statements. Accordingly, as applied to Judge Gooding, Canon 7 is unconstitutional as applied<sup>2</sup> because it prohibits political speech protected by the First Amendment to the Constitution of the United States.

According to Weaver, the proper analysis in evaluating the Constitutionality of Canon 7 as applied to Judge Gooding considers whether it restricts negligently made false statements, under an actual malice standard. Accordingly, such an analysis must determine (1) whether the statements Judge Gooding made were false, and (2) whether Judge Gooding made the statements with the knowledge that they were false or with reckless disregard as to whether the statements were false, i.e. with actual malice.

Judge Gooding has asserted, and continues to assert, that the statements made concerning his opponent's qualifications for office were, and are, true. Although a court evaluating a motion to dismiss a complaint must assume the facts alleged in a complaint are true, Hammonds v. Buckeye Cellulose Corporation, 285 So. 2d 11 (Fla.

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<sup>2</sup> If a regulation is unconstitutional as applied, the remedy is an injunction preventing the unconstitutional application of the regulation. Eide v. Sarasota County, 908 F.2d 716 (11<sup>th</sup> Cir. 1990). Further, as Justice Scalia stated in his dissenting opinion in Ada v. Guam Society of Obstetricians and Gynecologists, 506 U.S. 1011 (1992), "[t]he practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative."

1973), a protracted analysis regarding whether the statements were made with the requisite knowledge of falsity to enable the Constitutional application of Canon 7 must be preceded by a discussion concerning whether the statements were, in fact, false.

In the campaign materials at issue here, Judge Gooding characterized rental properties owned by his opponent as “slumlike” and “blighted.” As the campaign flyer clearly pointed out, the terms used to describe the properties were direct quotes from newspapers articles concerning the properties in question. The properties were described as “slumlike” and “blighted” in a St. Petersburg Times article entitled “*From Raggedy to Renovated, A Complex’s Makeover Wows Residents,*” ST. PETERSBURG TIMES, Aug. 1, 2002. Additionally, the articles repeatedly identified Judge Gooding’s opponent as the owner of the properties. Judge Gooding has learned nothing which would contradict the information in the articles cited by his mail piece, or which give him reason to doubt the veracity of the descriptions or statements he made.

Moreover, Judge Gooding’s quantification of his opponent’s trial experience was an accurate mathematical deduction made from statements his opponent made during the course of the campaign.<sup>3</sup>

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<sup>3</sup>During the campaign, Judge Gooding’s opponent publicly stated that he estimated he had tried 200 cases in his career. However, Judge Gooding’s opponent subsequently acknowledged - again publicly - that he could only account for or document 23 trials. 23 is 11.5% of 200. Thus, Judge

In the alternative, even if the statements were false, which Judge Gooding does not concede, Canon 7 may only restrict Judge Gooding's statements if they were made with the knowledge that they were false or with reckless disregard as to whether the statements were false, i.e. with actual malice. Actual malice is a deliberately subjective standard that turns on the defendant's state of mind. Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 688 (1989). The relevant inquiry asks whether the defendant "realized that his statement was false" or whether he "subjectively entertained serious doubt as to the truth of his statement" such that he published the statement with "a high degree of awareness of . . . probable-falsity." Bose Corp. v. Consumers Union of the U.S., Inc., 466 U.S. 485, 511 n.30 (1984); St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."). Actual malice is measured by what the defendant actually believed and not "by whether a reasonably prudent man would have published, or would have investigated before publishing." St. Amant, 390 U.S. at 731. See also Harte-Hanks Communications, 491 U.S. at 688 (holding that "[t]he standard is a subjective one—there must be sufficient evidence to permit the conclusion that

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Gooding's statement that his opponent had overestimated his trial experience by 88.5% was an accurate statement which in no way misrepresented his opponent's trial experience.

defendant actually had a "high degree of awareness of . . . probable falsity" (emphasis in original, internal quotations omitted)); St. Amant, 390 U.S. at 731.

Moreover, "one who repeats what he hears from a reputable news source, with no individualized reason external to the news report to doubt its accuracy, has not acted recklessly." Flowers v. Carville, No. 00-17299, 2002 WL 31500990 (9th Cir. Nov. 12, 2002) (citing Harte-Hanks Communications, Inc., 491 U.S. at 688 ("[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard.")).

On the face of the campaign pieces at issue, it is clear their contents are taken directly from reputable newspapers. Judge Gooding relied on the reputations enjoyed by those newspapers in assuming the statements were true. The fact that Judge Gooding published them, with no reason to doubt their veracity, does not amount to knowingly misrepresenting his opponent's qualifications. If, in fact, the statements are not true, they amount only to negligently made false statements made by a judicial candidate during a campaign. The Eleventh Circuit has specifically held that such speech may not be prohibited by Canons intended to regulate judicial conduct. Weaver, 309 F.3d at 1319.

WHEREFORE, for the reasons set forth herein, Respondent requests that this Court dismiss the allegations of paragraphs 3 and 4 of the Notice of Formal

Charges.

**LILES, GAVIN, COSTANTINO &  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **MARVIN E. BARKIN, ESQ.** and **MICHAEL K. GREEN, ESQ.**, Special Counsel for The Florida Judicial Qualifications Commission, 2700 Bank of America Plaza, 101 East Kennedy Boulevard, P.O. Box 1102, Tampa, Florida 33601-1102, and **THOMAS C. MCDONALD, JR., ESQ.**, 1904 Holly Lane, Tampa, Florida 33629, Special Counsel for The Florida Judicial Qualifications Commission, VIA FACSIMILE and U.S. MAIL this \_\_\_\_\_ day of February, 2004.

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Attorney